93-645

Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

IN RE: THEODORE V. and SANDRA A. OLSON,
Debtors.

UNITED STATES OF AMERICA,

Plaintiff-Respondent,
v.
THEODORE V. and SANDRA A. OLSON,
Defendants-Respondents,
v.
WILLIAM L. NEEDLER and FRANK HEINISCH,
Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the courts below have misconstrued the Nebraska Lien Statute and whether the Olson Attorneys have a lien on debtor's corn fund thereunder.

2. Whether the courts below have misconstrued the Nebraska "Common Fund Doctrine" and whether the Olson attorneys have an equitable lien on debtor's corn fund.

3. Whether perfection of the Olson attorneys' judgment lien, prevented by the automatic stay of the bankruptcy, is an equitable reason to grant the Olson Attorneys a lien on debtor's corn fund.

4. Whether the Olsons are entitled to a first priority administrative claim in the second Chapter 11 proceeding, and if not, whether this is an additional equitable reason to grant the Olson Attorneys a lien on debtor's corn fund.

LIST OF PARTIES

The parties to this actions are as follows:

The Petitioners are Frank Heinisch, Attorney at Law, Law Offices of Frank Heinisch, P.O. Box 311, Geneva, NE 68361 and William Needler, Attorney at Law, William L. Needler & Associates, Ltd., Box 177, 106 W. 1st Street, Ogallala, NE 69153; also 1430 Ridge Road, Northbrook, IL 60062.

The Debtor Respondents herein are: Theodore V. and Sandra A. Olson, Box 758, Atkinson, NE 68173. The Debtor Respondents' attorney is Robert Creager, Attorney, P.O. Box 4554, Lincoln, NE 68504.

The Respondent Internal Revenue Service of the United States, Washington, D.C., is represented by Robert D. Metcalfe, Trial Attorney, Tax Division, U.S. Department of Justice, P.O. Box 685,

Ben Franklin Station, Washington, D.C. 20044.

An interested party is Prudential Insurance Company, 1431 Opus Place, Suite 665, Downers Grove, IL 60515. Prudential is represented by Richard C. Anderl, Esq., The Omaha Building, Omaha NE 68102.

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PETITION FOR WRIT OF CERTIORARI
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The Petitioners, Attorneys William L. Needler and Frank Heinisch respectfully pray that a writ of certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered on July 21, 1993,

which affirmed the courts below in their refusal to grant the petitioning attorneys, hereinafter called the "Olson attorneys" a lien for their fees on the proceeds of Debtor's 1982 corn crop.

OPINIONS BELOW

The July 21, 1993 opinion of the Court of Appeals for the Eighth Circuit is unreported at this time, but appears at A 1-21[1]. A petition for rehearing with suggestion for rehearing en banc was denied on September 1, 1993. (A 22).

The District Court Opinion, rendered on July 6, 1992, is not reported but appears here at A 23-36.

The bankruptcy court's Memorandum Opinion appears at 101 B.R. 134 (Bkrtcy. Neb. 1989) and here at A 37-120.

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[1]"A" stands for the Appendix to this Petition.

The bankruptcy court's journal entry appears at A 121-122.

Other opinions below in the case are reported as follows: In re Olson, 20 B. R. 206 (D. Neb. 1982); In re Olson, 21 B.R. 123 (Bkrtcy. Neb. 1982); In re Olson, 22 B.R. 473 (D. Neb. 1982); In re Olson, 36 B.R. 74 (D. Neb. 1982); In re Olson, 730 F. 2d 1109 (8th Cir. 1984); and In re Olson, 133 B. R. 1016 (D. Neb. 1991), adhered to and mod. on reconsideration (July 6, 1992 opinion and order of the District Court).

JURISDICTION

The bankruptcy court derives its jurisdiction by referral pursuant to 28 U.S.C., sec. 157. The district court derives its original jurisdiction of bankruptcy cases pursuant to 28 U.S.C., sec. 1334 and its appellate jurisdiction

from 28 U.S.C., sec. 158. The Court of Appeals gains its jurisdiction under 28 U.S.C., sec. 158. This Court's jurisdiction is under 28 U.S.C., sec. 1254(1).

STATUTES INVOLVED

The statute involved in this case, which awards an attorney's lien under Nebraska law on funds held by an adverse party in the action or proceeding in which the attorney was employed, is Nebraska Code, par. 7-108. The provision is quoted verbatim by all three courts below and appears at A 8, 31 and 76. The provision reads:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

STATEMENT OF THE CASE

Most of the undisputed facts in this case are recounted by the bankruptcy court at 101 B.R. 136-140 (A 40-61), and because of their voluminous nature will not be repeated here. In sum, the bankruptcy court held as follows:

That the Olson Lawyers claim an interest in the fund escrowed by the debtor and others with the Overland National Bank of Grand Island because they performed necessary legal services which enabled the debtor to plant, maintain and harvest the debtor's 1982 corn crop, and that accordingly they should be compensated under the Nebraska Attorney's Lien Statute. The bankruptcy court held that the Lien Statute did not apply because the escrow agent was not an adverse party. It was conceded that "the

lawyers acted vigorously in both an offensive and defensive posture on behalf of the debtor . . ." The bankruptcy court specifically found at A 79:

> "The Court finds as a fact that the 1982 corn crop would not have been even planted by the debtor-in-possession but for the efforts of the lawyers. Prudential and other creditors fought the debtor at every turn. They attempted to prohibit the planting of the crop, to prohibit the obtaining of secured or unsecured credit to plant and maintain and harvest the crop. They moved to sequester rents and profits and they moved for relief from the automatic stay. They took action in the state courts to replevin the equipment which was necessary for the farm-

ing operation. The debtors, because of the legal efforts of the lawyers, were successful in producing a 1982 crop, paying the secured and unsecured suppliers and turning the crop into actual cash soon after harvest."

Nevertheless, the court ruled:

"However, no matter how hard they worked and no matter what they did, the lawyers did not obtain either a judgment or a settlement nor did they create a fund to which an attorneys' lien could attach." (A. 81).

The bankruptcy court also ruled that the Olson lawyers, the Appellants, did not have a perfected judgment lien against the fund because (i) the judgment runs against Theodore Olson and not

Sandra Olson and a good portion of the fund belongs to her, (ii) the Olson lawyers did not move further to perfect their judgment lien under state law, instead the Overland bank brought this declaratory judgment action to settle claims against the fund.

The bankruptcy court further held that, while the Olson Lawyers had a valid unsecured claim against Theodore Olson in the second Chapter 11 proceeding, they did not have a priority administrative claim. The court held that upon dismissal of the first case, the Olson Lawyers claim for fees simply became an unsecured claim against Theodore Olson.

In affirming the bankruptcy court, the District Court (A 23) held only (i) that the Overland bank was not an adverse

party so as to trigger the Nebraska Attorney's Lien Act and (ii) that it was not an abuse of discretion for the bankruptcy court, when considering the dismissal of the 1982 case to find, as a matter of fact, that the Olsons' Lawyers claim for fees became an unsecured claim against the estate.

In affirming the District Court (A 1, 20-1), the Court of Appeals concluded in its opinion of July 21, 1993:

> "In summary, under governing Nebraska law, the lawyers do not have an attorneys' lien since the facts do not bring their claims within the purview of the statute in question. They are not entitled to an equitable lien under the "common fund doctrine" since the proof did not establish that the lawyers

"created" the fund on which the lien was claimed. At best. the lawyers demonstrated that their legal services facilitated the growing of the crop which resulted in the creation of the fund. The facts therefore do not bring the claim within the purview of the "common fund doctrine" and the claim must fail under that theory. Finally the lawyers do not have a judgment lien on the interpleaded funds since they never acted to perfect their alleged lien under Nebraska law."

On September 1, 1993, the Eighth Circuit Court of Appeals denied the Olson Attorneys petition for rehearing with suggestion for rehearing en banc.

This Petition is being timely brought within 90 days of the Circuit

Court Order and Opinion.

REASONS FOR GRANTING THE WRIT

I.
The Lower Courts Have Construed Nebraska Law So As To Render It Meaningless In A Bankruptcy Setting Thus Requiring Correction And Supervision By This Court

This Court should grant certiorari for the reason that the courts below have construed the Nebraska Attorney Lien Act and the Nebraska equitable "common fund doctrine" in such a way as to make them meaningless within a bankruptcy setting. They have allowed the Internal Revenue Service to horn in on farming profits for which the Petitioners are largely responsible by the simple expedient of holding that the escrowee bank is not an adverse party thus making the Nebraska attorney lien law inapplicable, and by holding that, because only a "creator" of a common a fund can claim it, the debtors

attorneys (who did not grow the crop) do not qualify. Neither of these propositions has any basis in Nebraska law, as hereinafter demonstrated.

It is to be emphasized that the IRS claim against Mr. Olson has nothing to do with farming or the farm reorganization under Chapter 11 conducted by the Petitioners and their clients. As explained in In re Olson, 133 B. R. 1016, 1017, "Theodore V. Olson was both a self-employed farmer and the president, chief operating officer, and sole shareholder of Olson Brothers Manufacturing Company, an entity that manufactured and marketed center pivot irrigation systems." Mr. Olson, as a "responsible person," has been held personally liable for unpaid OBM social security taxes merely because OBM failed to specify that these taxes

were to be paid first before other tax obligations. Id. 133 B.R. at 1018. It is these "trust fund" taxes that IRS seeks to prefer in the second bankruptcy under 11 U.S.C. 507, thus placing itself in a superior position to Petitioners should they have no lien on the corn fund. Nothing could be more inequitable, unjust and in derogation of the bankruptcy laws.

II.

It Was Only Through the Tireless and Continuing Efforts of the Olson Attorneys That the 1982 Crop Was Grown And Sold And Other Benefits Were Realized

When the Olsons' first Chapter 11 was filed on March 1, 1982, the automatic stay went into effect and prevented Production Credit Association (PCA) from foreclosing its prior security interest in some 530,00 bushels of 1981 corn grown by Ted Olson. Throughout the summer, legal battles raged to prevent debtors

from selling the 1981 corn crop and using the proceeds to finance the 1982 corn crop, to prevent the debtors from seeking other financing, and to put the debtors out of business by foreclosing on their farm equipment.

There were innumerable court appearances and hearings requiring the preparation of voluminous pleadings, affidavits and taking of evidence. The docket of the first bankruptcy case is replete with the efforts of the debtors to seek a fair opportunity to reorganize and to prevent the creditors from putting them out of business.

The creditors attempted to make impossible the planting of the 1982 corn crop by bringing actions to replevin the debtors' farm equipment. The 1981 crop had to be sold and delivered to make room

to store the 1982 crop. Constant negotiations were required with nervous suppliers. Debtor was denied use of cash collateral and the crop was planted anyway on the credit of the suppliers. Anhydrous fertilizer and irrigation fuel were also denied to the point of crop damage. Fertilizer, fuel and resources were maintained as the result of the legal advice and services rendered in negotiating with suppliers and finding other ways to keep the farm operating.

Harvest expenses were resisted by PCA, Hancock and Prudential, and the Olson Lawyers had to intervene to gain the necessary fuel, manpower and equipment to complete the harvest.

Olson Lawyers assisted in arranging the sealing of the 1982 corn crop under the ASCS Farm Stored Feed Grain Reserve

Program, resulting in a profit to the estate of over one dollar ($1.00) above market price for 391,070 bushels of corn. Not only did PCA resist, but the U.S., Department of Agriculture (ASCS) denied sealing the corn at both the local level and state levels before Olson Lawyers successfully negotiated the sealing and loan with the ASCS regional counsel. There were numerous meetings and hearings on sealing the corn and escrowing the loan funds.

The 1982 crop benefitted the Debtors' estate with gross proceeds escrowed with the Overland National Bank in Grand Island in the amount of $1,122,370.90 corn loan and $105,377.05 1983 corn storage prepayment. After payment of expenses, as of June 25, 1983, there was $405.016.00 in the escrow

account.

At the time of filing the first Chapter 11 petition on March 1, 1982, the debtor had 513,000 bushels of 1981 corn on hand, with a market value of $2.25 a bushel. Legal services were provided by the Olson Lawyers overcoming the objections of PCA resulting in the sale of the 1981 corn at $2.75 a bushel, a gain of fifty cents a bushel or $256,600.00. (PCA had demanded that the corn be sold at $2.25 a bushel). A secondary benefit to the debtors' estate, made possible by the Olson lawyers, was the freeing of the Debtors' grain storage bins to permit the sealing of the 1982 crop.

The participation of Olson in the 1983 PIK program was resisted and through the efforts of the Olson Lawyers, the

Debtor qualified for the 1983 PIK program which was the only income earned from the Olson farms in 1983, since the court refused to permit the Debtors to farm in 1983.

Ironically, Prudential, the very party that led the fight to block the planting of the 1982 corn crop, claimed the proceeds thereof. Moreover, the United States and Prudential by bickering over the 1982 corn fund refused to allow its use to plant a 1983 crop. Moreover, they damaged the 1982 crop by their wanton irresponsibility in refusing to allow funds to be used for fertilizer and irrigation. They thus waived their right to any interest in the proceeds. Finally, they wantonly and foolishly forced debtors to idle their land in 1983 so that they could set up cause for dis-

missal on the ground that reorganization was hopeless.

The United States and Prudential have no legal, equitable or moral right to the 1982 corn fund. The bankruptcy court found abundant and sound reasons to deny them any rights in the fund, and these reasons are now the law of the case.

The Debtors' estate benefitted by the direct and proximate result of the efforts of Olson's lawyers in the following manner, all of which were actively and even hysterically resisted by PCA, Prudential and Hancock:

Net Proceeds To Estate

Profit from raising and sealing the 1982 crop.....$405,016.00

Increased profit by holding and selling 1981 crop....256,500.00

Qualifying Debtors in the 1983 PIK program.....316,605.00

TOTAL $978,121.00

The 1982 corn crop and proceeds resulted from the direct efforts of the Olson lawyers. The bankruptcy court in the second Chapter 11 proceeding found "as a fact that the 1982 corn crop would not have been even planted by the debtor-in-possession but for the efforts of the lawyers." In re Olson, 101 B.R. 134, 143 (A. 79). Without the Olson Lawyers there would not only have been no 1982 corn crop but none of the above profit.

The above was not just a "tireless effort" on the part of the Olson Lawyers, but a superhuman achievement against all odds. Ironically, no matter how hard they worked, the second bankruptcy court could find no way to secure their fees. Needless to say, as matters stand, this is a warning to debtors' attorneys

nationwide not to do all that can be done for their clients, but rather to ration their efforts and take no risk.

Certainly the $978,121.00 profit qualified as a "substantial contribution, but there was more. The Olson Lawyers were responsible for settling the PCA claim of over $4,500,000.00 against the estate. Also released were PCA's claims to the 1982 corn fund and its second liens on the lands of the estate. These lands appreciated dramatically in value during the first bankruptcy proceeding. It is thus to be emphasized that not only were Olson attorneys materially and directly responsible for creating the 1982 corn fund, but they preserved it and protected it from the PCA claim (and other claims). Moreover, the Chapter 11 filed by the Olson Lawyers on March 1,

1982, Cause No. BK-00379, stopped all foreclosures and efforts to foreclose. The diligent and successful efforts of the Olson Lawyers to resist the motions for Relief From Stay by Hancock, PCA and Prudential were also very substantial contributions to the estate.

The Olson lawyers were faced with three expert creditor law firms, with two nationally known counsel, who fought daily over the Olson estate as they strived to "do a job" for their creditor-clients. As far as the Olson lawyers could ever determine, they never gave a thought to whether putting the Olsons out of business was detrimental to the interests of their clients. Apparently the creditors involved, with fiduciary responsibilities to their shareholders and/or the public, never gave the

slightest thought to their own self interest but conducted a grudge fight against the debtors. They could have had so much more if they had cooperated and encouraged the debtors.

Isn't it strange, that despite a plethora of law to the contrary, the second bankruptcy court could not find a reason to secure the Olson Lawyers, even though:

(i) by the end of 1982, nine months after filing the first Chapter 11 petition, its docket had grown to some 230 entries; the Needler law firm had invested 1,696.2 hours and the Heinisch law firm had invested 623 hours in beating back creditor attacks. And, for the year 1983, the docket grew another 202 entries with the Needler firm adding another 988.64 hours and the Heinisch law

firm another 397.1 hours. Thus, at the end of 1983, shortly before the first bankruptcy was dismissed, the docket had 432 entries; the Needler firm had invested 2,684.85 hours and had advanced $13,288.39 in disbursements while the Heinisch firm had invested 1,020.1 hours in the case and had advanced $2,989.48 in disbursements. (See first bankruptcy docket and fee claims of Needler & Heinisch).

(ii) the failure to award fees to the Olson Attorneys by the first bankruptcy court can only be characterized as disobedience to the spirit if not the letter of then District Judge Arlen Beam's opinion in In re Olson, 36 B.R. 74 (D. Neb. 1983)

As previously stated, on March

13, 1983[2], the first bankruptcy court awarded the Olson Lawyers interim fees. However this order was vacated when it was discovered, on April 13, 1983 that the Olson lawyers had not formally applied for employment. But, on December 23, 1983, Judge Beam, reversed the bankruptcy court's order denying employment and declared that the Olson Lawyers were entitled to be employed nunc pro tunc from March 1, 1982 (the day the first Chapter 11 petition was filed). Id., 36 B. R. 77.

This should have had the effect of revitalizing the expunged orders granting interim fees, and should also have permitted the Olson lawyers to apply for additional interim fees. However,

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[2]Additionally, interim fees that the court awarded on November 29, 1982 were never paid.

the ink was hardly dry on Judge Beam's Order and Opinion before Judge Stageman, the first bankruptcy judge, reached back and revived a dormant motion for dismissal by Prudential (filed the previous May) and dismissed the case on January 29, 1984.

This had the effect, according to both the first and second bankruptcy courts of "putting everything back as it was" prior to the filing of the first petition, thus destroying any administrative priority of the Olson Lawyers.

Contrary to the opinion of the second bankruptcy court, the Olson lawyers had every reason to expect that their fees would be paid from the 1982 corn crop escrow once the frivolous claims of the opposing creditors thereto

had been defeated. What other source was there? When the bankruptcy court did not permit the debtor to further reorganize and dismissed the case in deference to unfair demands of the creditors, thus destroying their priority, the Olson lawyers had every right to look to the fund they had created for satisfaction.

As stated by Judge Beam at 36 B.R. 75 when granting the Olson Lawyers nunc pro tunc employment:

> "This result is particularly appropriate in the present case in which the Bankruptcy judge has expressly acknowledged the tireless efforts of the attorneys in representing the bankruptcy estate. Furthermore, the delay between the application and the denial of employment and further delays on

appeal must necessarily have caused expense and prejudice to counsel who properly have remained active on the debtor's behalf." (Emphasis added.)

III.
The Olson Lawyers As A Matter of Equity Were Entitled To a Lien on the 1982 Corn Crop Fund.

In S. T. Foods, Inc., 202 F. Supp. 37, 40 (D.C.S.D.N.Y. 1962), there was a question of whether a fund held by the trustee was part of the estate, but the Court resolved that by saying:

"[1] It is well settled that bankruptcy proceedings themselves are purely equitable in their character, and, within the limits prescribed by the bankruptcy act and the special rules of practice prescribed by the Supreme Court, are to be administered in accord with the general principles and practices of

equity." Westfall v. Avery, 171 F. 626, 628 (4-Cir. 1909); 11 U.S.C.A. 11, sub. a. See also Local Loan Co. v. Hunt, 292 U.S. 234, 54 S. Ct. 695, 78 L. Ed. 1230 (1934).

It is true that these equitable powers must be exercised within the limits laid down by the Bankruptcy Act and subject to its specific provisions (In re. Concentrated Products Corp., 88 F., 2d 745 (3rd Cir. 1930), and the court may not grant equitable relief which overrides a clear congressional mandate as to the manner in which claims should be marshalled or priorities afforded. In re. Columbia Ribbon Co., 117 F. 2d 999, 1002 (3 Cir. 1941). But this is not to say that the bankruptcy court in

the exercise of its equitable powers may not allow a charge which in equity and good conscience should be made against a fund in the hands of one of its officers and under its control. Such an allowance does not override any mandate of Congress expressed in the Bankruptcy Act and has been approved in the cases which have been cited above." (Emphasis Supplied).

At bar, the equitable powers of the bankruptcy court and/or the court in bankruptcy are specifically affirmed and endorsed in the Bankruptcy Code, 11 U.S.C., sec. 105, Power of Court[3]:

(a) The court may issue any order, process or judgment that is neces-

[3]This has not stopped the persistent efforts of creditors to denude bankruptcy courts of their equitable powers.

sary or appropriate to carry out the provisions of this title.

Accordingly, it is not just state lien law that should be considered, but the equity of applying that law within the bankruptcy context and pursuant to the equitable powers of the bankruptcy court.

At bar, the 1982 crop fund is property of the estate under 11 U.S.C. 541. It was first held by a third party, Overland National Bank, subject to the establishment of any claims thereto by those who might have an interest. There was a hiatus in its control by the bankruptcy court between the first and second Chapter 11 bankruptcy proceedings. It was at this point that various parties asserted their claims under state law, including the Olson Lawyers. The Overland bank could not release the fund

to any party without the permission of the debtor else it would breach its fiduciary duty. The Overland bank brought a declaratory judgment action in state court. The action was not an interpleader because the fund was not under court control at that point in any way, shape or form. Only when the debtor filed the second Chapter 11 case was the power of the bankruptcy court reasserted and the declaratory judgment action removed to bankruptcy court by way of the District Court's automatic referral.[4] 28 U.S.C., sec. 157.

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[4]However, in due course the funds were ordered deposited with the Clerk of the U.S. District Court for the Northern District of Nebraska, but this has no bearing on this declaratory judgment (interpleader) action. The results are the same either way. The interest of the Olson Lawyers is in the nature of a constructive trust on the proceeds of the corn crop no matter by whom or how they are held.

The fund has never been held by the Overland bank for the "benefit of the parties." It has always been held for the benefit of the debtors, subject to adverse claims. The Overland bank has never been "neutral," as suggested by the bankruptcy court. The Overland bank is the debtors' escrow agent and fiduciary and is as adverse to the claimants as the is the debtor and his creditors. It would have been impossible for the bank to bring a declaratory judgment action if it were not adverse. Pursuant to 28 U.S.C. sec. 2201, any court of the United States may order declaratory relief "in a cause of actual controversy within its jurisdiction." Id. The Act itself does not confer subject matter jurisdiction on the court to hear the declaratory judgment matter. "The Declaratory

Judgment Act is strictly remedial in nature and does not provide a separate basis for subject matter jurisdiction." Lawline v. American Bar Association, 738 F. Supp. 288 (N.D. Ill. 1990), affirmed, 956 F. 2d 1378 (7th Cir. 1992). The fact that this declaratory judgment (interpleader) action still pends is its own proof that an actual adverse controversy exists.

In short, the bank had to be an adverse party in order to bring the declaratory judgment action. It, of course, was adverse because it was the debtors' agent. Now the Clerk of the District Court is holding the fund on behalf of the debtor estate, subject to resolution of conflicting claims against it. The estate is still an adverse party to the claimants, and under the rationale

of In re S.T. Foods, Inc., 202 F. Supp. 37, 40 (D.C.S.D.N.Y. 1962) there is no reason why the bankruptcy court of equity cannot satisfy Petitioner's fees from that fund.

The authorities upon which the Court in In re. S. T. Foods, Inc. relied for this power (at 202 F. Supp. 40) are: Byrer v. Bushong, 108 F. 2d 594 (4th Cir. 1940); In re Prindible, 115 F. 2d 21 (8 Cir. 1940); In re. Centralia Refining Co., 35 F. Supp. 599 (E.D. Ill. 1940); In re Beardsley, 35 F. Supp. 799 (D. Md. 1941); 6 Remington on Bankruptcy 2606-2612, 2629 (5th Ed. 1952); 3 Collier on Bankruptcy 64.022, ftn 10 (14th ed. 1956), and cases cited in both texts. Cf. Sulmeyer v. Miller Engineering Co., 297 F. 2d 856 (9th Cir. 1962).

In In re. Paramount Publix

Corporation, 10 F. Supp. 504 (D.C.S.D. N.Y. 1934), the District Court allowed the Debtors' prior attorneys' fees in a subsequent Chapter 7 because equity demanded it.

Judge Beam (now Circuit Judge Beam) noted at 36 Br. 75: "Needler is an expert in insolvency law." The estate was large and complex and required the kind of patience and skill described in In re Paramount Publix, supra, to maximize and conserve it.

And in In re. Lesser, 100 F. 433 (D.C.S.D.N.Y 1900), the bankruptcy court, allowed fees for preserving assets of the estate, stating: "...it is competent for the court to make a reasonable allowance as indemnity for the costs and expenses by which these benefits have been obtained ...."

At bar there was a benefit of nearly a million dollars (well over with interest) for which the Olson lawyers were responsible. It is not too much to ask that their fee interest be protected by a charging, judgment or administrative lien on the fund proceeds at the Overland bank.

The equitable "common fund" doctrine, that a benefitted class should bear the cost of producing the benefit is well recognized and accepted. It is based upon state law. See In re Texaco, Inc., 85 B.R. 934, 938 (Bkrtcy. S.D.N.Y. 1988) which held that:

> "The "common fund" as a source of counsel fees was created single-handedly by the United States Supreme Court in Trustees of Internal Improvement Fund v.

Greenough, 105 U.S. (15 Otto) 527, 26 L. Ed. 1157 (1882) and repeated in Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 5 S. Ct. 387, 28 L. Ed. 915 (1885), both being non-bankruptcy cases where attorneys were given compensation for litigation that created, increased, or protected strangers' shares in funds as a result of the legal services rendered in successful litigation by the attorneys.

Having produced a fund of assets for this estate as a result of their state court litigation, the Anderson firm is entitled to rely upon the attorney's statutory charging lien with respect to their post petition legal services which are embraced under such lien. Id. 940. Gordon v.

Shirley Duke Associates, A.P.I., 611 F. 2d 15 (2nd Cir. 1979)."

Attorney Heinisch testified at the hearing before the bankruptcy court that the Olson lawyers relied on the 1982 crop funds in escrow as the source from which their fees would be paid. Indeed, that would prove to be the only source available in the event the debtors' "obdurate foes" prevented reorganization.

In Tuttle v. Wyman, 149 Neb. 769, 32 N.W. 2d 744, 749 (1948), the court ordered the payment of attorneys fees from the land, rents and profits which the attorney had saved for his client. It was understood and agreed that the attorney was to have a portion of the recovery as compensation.

At bar, all parties to the Olson Chapter 11 proceedings knew very well

that the only funds available to pay legal fees were the escrowed 1982 crop funds in the event the Olsons were not permitted to reorganize. Payment of legal fees from the escrowed 1982 crop funds should not be a surprise. Equity follows the natural and expected outcome --payment of the Olson legal fees from the available funds in the customary manner on a preferential and priority basis in the bankruptcy. Certainly, the Olson Lawyers were entitled to be rewarded from the escrow at least on an equitable quantum merit basis.

In In re. AFCO Enterprises, Inc., 35 B.R. 512, 515 (B.C.D, Utah, 1983), the court permitted the award of legal fees from the secured collateral proceeds even though the net equity in the property may have decreased while the Chapter 11

proceeded. The court spoke of the dire effects of ruling otherwise:

> "[F]ee claimants voluntarily contribute to the ideal of rehabilitation. Section 331 encourages this volunteerism and, as an inducement to work for the estate, is a vital provision of the Reform Act . . . . If the superiority, in turn, might pre-empt interim fees, it would jeopardize the further provision of services. The result would not be attractive. . . . [Fee claimants] might cut corners, but this would cause delay . . . . They might demand exorbitant retainers at the beginning of each case: but for most debtors this either would be impossible or would decrease their chances for rehabil-

itation.

It is likewise unfair, if not unrealistic, to expect counsel to underwrite the reorganization. This would drive experienced and expert counsel to more reliably lucrative fields of practice. Cf. Collier on Bankruptcy, supra, Section 331 at 331-2-331-3; In re International Horizons, Inc. 10 B.R. 895, 897 (N.E. Ga 1981);In re. Quick Release, Inc., 6 B.R. 713, 715 (Bkry., D.S.C. 1980): In re Western Farmers Ass'n., 8 B. R. 539, 542 (Bkrtcy. W. D. Wash. 1981); In re Callister, 15 B.R. 521, 523 (Bkrtcy. D. Utah, 1981).

The orderly administration of justice in bankruptcy cases depends upon willing and vigorous representation by

competent legal counsel. To require the Olson Lawyers to absorb the legal fees for extended and extensive litigation is unfair. Thousands of hours were invested to keep the debtors afloat and their creditors at bay. For the court to permit the creditors to blitz the debtors with ongoing contested hearings at every turn without payment of fees to debtors' lawyers is grossly unfair -- as unfair as it would be to allow the debtors to deprive their attorneys of priority for their fees by the simple expedient of bringing another Chapter 11 proceeding after dismissal of the first.

It is not necessary for the Olson lawyers to be administrative, judgment or charging-lien claimants in order to have priority lien. They need only have an equitable right to be reimbursed from the

fund. Since the courts below concede that but for the Olson Lawyers there would be no fund, they have the very highest of equitable claims to priority. It was therefore error for the bankruptcy court to deny priority to the Olson lawyers, especially when they were also administrative, charging-lien and judgment claimants, and further error for the District Court and Court of Appeals to affirm.

IV.

The Olson Lawyers Have a Valid Priority Administrative Claim

In In re. Jensen- Farley Pictures, Inc., 47 B.R. 557 (Bkrtcy. D. Utah, 1985), the court held that, in enacting the statute dealing with administrative expenses entitled to first priority status, Congress intended to adhere to the "direct benefit" rule of decisions

under Sections 242 and 243 of the Bankruptcy Act. Congress intended this to apply irrespective of whether there had been a confirmed Plan, and provided the expense met the "substantial contribution test". The court thoroughly outlined the priorities given by Section 503 of the Bankruptcy Code at 47 B.R. 56, and exhaustively discussed the reasons and legislative history behind them.

The Olson Lawyers certainly qualify under the substantial contribution and direct benefit tests. At this juncture, the Olson Lawyers are creditors and have produced a fund under a prior Chapter 11 which would qualify under former rule 10-215(c)(1)(B), and under the present Code provisions and rules cited above. The attorneys fees, expenses and services performed by the Olson Lawyers have been

previously found to be reasonable and necessary by Judge Beam as required by the direct benefit rule. He found these services to be beneficial to the estate and that they contributed to a plan which was not confirmed, but was aborted by a dismissal. Interim fees had been awarded by the bankruptcy court and then unfairly and unlawfully vacated. In Re Olson, 36 B.R. 74, 7-77).

As Collier states in Volume 6A of the 14th Edition, the main cornerstone was met, and that is the benefit to the estate.

Without the Olson Lawyers, there would have been no 1982 crop, no $978,121.00 profit and no 1982 crop fund to fight over. The Olson Lawyers are entitled to have their claim treated as a priority administrative expense against

the 1982 corn crop.

V.

The Olson Lawyers Should Have Been Allowed To Assert Their Attorney's Lien Against The Overland 1982 Corn Crop Fund For It Is Untrue That The Fund Was Held By Parties That Were Not Adverse

At the time the 1982 crop fund was created, it was property of the estate under 11 U.S.C. sec. 541, and the fund belonged to debtors, subject to the valid and to-be-established claims of the opposing parties. Had Bankruptcy Judge Stageman not made a determination that the 1982 corn fund was property of the estate, no order by him setting up the escrow at the Overland bank could have been valid. Such an order would have been void for want of jurisdiction.

28 U.S.C., sec 1334(d) grants the bankruptcy power to the United States District Courts for "exclusive

jurisdiction of all property wherever located as of the commencement of the case and of property of the estate."

The 1982 crop fund was clearly property of the estate of Sandra and Ted Olson under 11 U.S.C., 541, including all legal and equitable interests. (See Collier 15th Edition,, Section 541).

Certainly changing the crop into cash didn't change the nature of the property or its ownership. It was still personal property belonging to the estate.

The Olson Lawyers rendered fees and advanced costs in the bankruptcy case in which the fund was created, thus qualifying for an attorney's "charging" lien under Section 7-108 of the Nebraska Revised Statutes (quoted verbatim herein at page 5 and at A 8, 31 and 76). See

Reynolds v. Warner, 258 N.W. 462 (Neb. 1935). The Olson Lawyer's charging lien is against both Ted and Sandra Olson, both of whom the Olson Lawyers represented. Whether or not the lawyers obtained a judgment against Ted or Sandra Olson, or both, is totally irrelevant as it is not necessary to have a judgment for the Nebraska Attorney's Lien Act to come into play.

In Neighbors and Danielson v. West Virginia Hospital, 77 N. W. 666 (Neb. 1956), an attorney's lien was enforced even though the funds were in the Scottsbluff National Bank, in a special account, under a "Contract and Stipulation".

The charging lien is effective when the notice under Nebraska Revised Statute, Section 7-108 is given to the

party in possession of the fund. Kleger v. Schaneman, 322 N. W. 2d 659 (Neb, 1982). This notice need not be in writing. According to the Nebraska Supreme Court, any notice of existence of the claim is sufficient. As stated at 322 N.W. 2d 663:

> "Such notice is necessary to prevent bona fide settlement of the controversy by the litigants and payment by the debtors to the creditor in ignorance of the attorney's rights."

In support of the Olson Lawyers' position that the escrow agent is to be considered an adverse party, an agent of the debtor's estate against whom the Olson Lawyers have claim, see State of Nebraska v. Richter, 764 F. 2d 317, which involved money seized as part of a criminal investigation. The court held

that defendant's attorney was entitled to priority of his attorney's lien over tax liens filed by the IRS. The court found that the seizure of the money created an adversarial relationship. The court rejected the government's argument of the non-adversarial nature of the court-appointed receiver cases.[5] There is little or no difference between the loss of control in the Richter case and the adversarial holder of funds in that case and the loss of control at bar, where the court ordered the crop funds to be escrowed at the Overland bank pending resolution of the adversarial claims. It

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[5]It was error for the bankruptcy court to liken the Overland bank to a receiver. First, the appointment of a receiver is prohibited by Section 105 of the Bankruptcy Code, and the trustee in bankruptcy may clearly be adversary to a particular creditor against whom he may even bring suit.

is not necessary, as stated by the bankruptcy court, for the lawyer to have achieved a judgment or settlement of the case in order to have an attorney's lien.

In Tuttle v. Wyman, 149 Neb. 769, 32 N.W. 2d 744 (1948), rents and profits were held in trust by reason of a court order for the benefit of the devisees of a will. The Court permitted the attorney charging lien against the funds in the custody of the court. The court said:

> "It was all in the hands of the adverse parties, but actually in in the custody of the law and under the complete jurisdiction and control of the court for that purpose." (32 N. W. 2d 749).

It is untrue that under Nebraska law a third party escrowee or the Clerk of the Court is not adverse, for they are

holding for adverse parties, in this case the debtor and his creditors. Accord, Kleager v. Schaneman, 322 N.W. 2d 659 (Neb. 1982). As the Tuttle court noted further: ". . .the statute giving an attorney a lien on money in the hands of the adverse party must be liberally construed." (32 N. W. 2d 749).

Thus, it is not so much the kind of depository involved (e.g. clerk of court, bank or debtors' agent) that makes it adversarial, but rather whether the depository, by the terms of its employment, is to resist the claims against it. The escrow agreement specifically provided that the escrowee bank be reimbursed in the event it was necessary to file the declaratory judgment action that it did. When adverse claims were made, the Overland bank did not hesitate. It

brought suit for declaratory judgment premised on the adversarial relationship of the debtors to the adverse claimants. Clearly, the Olson Lawyers had a charging lien on the 1982 crop fund which they had created, which they had preserved and maximized, and which had been segregated in adversarial hands. The proper method to enforce a lien is to file a petition for intervention. Spettman v. Hofeld, 2 N.W. 2d 621, 141 Neb. 832. The Olson Lawyers did not need to intervene because (i) they were sued for declaratory judgment by the Overland bank, and (ii) they have in a sense intervened by filing fee applications and claims in the two bankruptcies. The procedure followed by the Olson Lawyers regarding their charging lien was proper and the Bankruptcy Court erred when it denied recovery.

The Olson attorneys met all of the requirements of Nebraska law when imposing their lien.

1. Fees and expenses are a claim in the same case as the fees and expenses arose, and that is true at bar. Reynolds v. Warner, 258 N.W. 462 (Neb. 1935).

2. A charging lien may arise out of an agreement between a client and his attorney, that the attorney is to receive a portion of the proceeds provided this appears to be the intentions of the parties. Neighbors & Danielson v. West Nebraska Methodist Church, 77 N. W. 667 (Neb. 1956). At bar this was the case, but in any event would be inferred by the circumstances as a matter of equity and client responsibility. The debtors would be estopped from asserting domain over these funds when they had not paid their

attorneys because of the crucial nature of the services provided in creating the fund. The balance of such funds after the object of the escrow is fulfilled, is subject to attorneys' liens. State ex rel. Nebraska Bar Assn. v. Bachelor, 139 Neb. 253, 197 N.W. 138 (1941).

3. The object of a charging lien is to procure an attorney payment out of the fruits of his own labor. Jones v. Duff Grain Co., 95 N. W. 1, 61 N.E. 91 (1903).

4. The proper method of enforcing a charging lien is by resorting to equity because a lien is equitable in nature. Kleager v. Schaneman, 322 N. W. 2d 659 (Neb. 1982).

5. The lien commences from the time of giving notice of the lien to the adverse party or party having possession

of the claim against the fund is sufficient notice and need not be in writing or in any specific form. Kleager v. Schaneman, 322 N. W. 2d 659 (Neb. 1982). At bar, it is undisputed that notice was given to the Overland bank by the Olson Lawyers.

6. In makes no difference if the funds are interpleaded or held in the hands of an escrow agent. The fund which was in dispute and subject to the attorneys' charging lien in Kleager v. Schaneman, 322 N. W. 2d 659 (Neb. 1982) was paid to the Clerk of the District Court.

7. The attorneys lien is paramount to any rights of the parties in the suit. Meyers v. Miller, 134 Neb. 824, 279 N. W. 778, 117 A.L.R. 977. This is the origin of the administrative priority in

bankruptcy of the lawyers' fees. Accordingly, the Olson Lawyers charging lien is superior and paramount to the claims of the debtors, IRS, PCA or any other creditor.

8. Funds held for a special purpose after accomplishment of the purpose are accordingly then subject to an attorney's lien on the balance remaining. State ex rel Nebraska Bar Assn. v. Bachelor, 139 Neb. 253, 297 N. W. 138 (1941). The claims to the 1982 corn fund have now been satisfied, released or found unjustified. The fund is now correctly subject to the charging lien of the Olson Lawyers.

9. A charging lien exists until satisfied or released. The charging lien of the Olson Lawyers has never been satisfied or released. It should

declared by this Court to remain effective in order to protect the labors, the "tireless efforts," of the Olson Lawyers.

VI.

The Bankruptcy Court Should Have Declared The Olson Lawyers' Judgment Against Ted Olson To Have Priority As A Judgment Lien Against the 1982 Crop Escrow Held By The Overland Bank

Had there been no second Chapter 11 filing, the Olson Lawyers would have simply perfected their default judgment against Ted Olson and asserted it in state court against the corn fund in the declaratory judgment action brought there by the Overland bank. It was unnecessary to apply to state court or take other steps to "perfect" the judgment. Because, as previously noted, the bankruptcy court had jurisdiction of all of the debtors property, because the

declaratory judgment action was removed to bankruptcy court, and because the bankruptcy court is a court of equity, there was no need to go further. The Olson lawyers did not need to proceed further for a determination of ownership under state law because the Overland bank had brought a declaratory judgment action to accomplish that purpose. The bankruptcy court should simply have recognized the default judgment against Ted Olson as another reason the Olson Lawyers should be granted a priority lien against the 1982 corn fund. Clearly, had it not been Mr. Olson's desire and agreement to grant the Olson Lawyers priority in the 1982 corn fund, he would not have permitted the default judgment.[6] There

[6]As a matter of fact, on March 16, 1984, Theodore V. Olson entered an agreement on legal fees with his

was no reason or circumstances preventing the Olson Attorneys from a priority lien against the 1982 crop fund at the Overland bank as is customary in such cases.

CONCLUSION

Petitioners, the Olson Lawyers, William L. Needler of William L. Needler & Associates, Ltd. and Frank Heinisch respectfully request this Court to hear and grant its Petition for Writ of Certiorari to the United States Eighth Circuit Court of Appeals, to reverse and vacate the judgments below with instructions to the bankruptcy court to order a priority lien in favor of the

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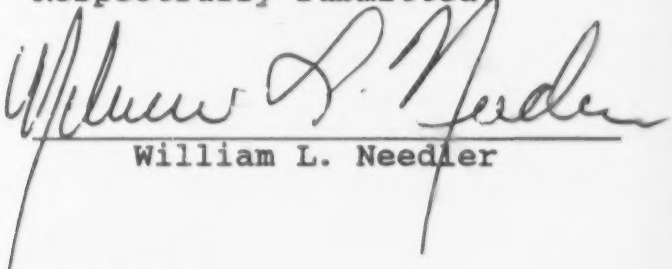
attorneys which provided that the attorneys had a lien upon money in the hands of adverse parties and the Overland Bank is listed as one of those parties (A 123.

instructions to the bankruptcy court to order a priority lien in favor of the Olson Lawyers against the 1982 corn crop fund, pursuant to a final and complete award and accounting of fees and costs by bankruptcy court.

Additionally, Petitioner requests whatever other relief this Court deems equitable and just.

Respectfully submitted,



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